

IN THE
Supreme Court of the United States

October Term, 1978

No. 78- **169**

MILLIKEN & COMPANY,

v.

FEDERAL TRADE COMMISSION, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	3
Questions Presented	3
Statutes and Regulations	5
Statement of the Case	6
The Parties	6
Milliken	6
Federal Trade Commission	8
General Accounting Office	8
The Programs	8
CPR Program	9
LB Program	11
Litigation	16
Reasons for Granting the Writ	18
I—The decision below improperly ignored the prior decisions of this Court in holding a challenge to publication premature because it was raised as an objection to data collec- tion	18
II—The decision below conflicts with the decision of the Fifth Circuit in <i>Genuine Parts Co. v.</i> <i>FTC</i> by improperly ignoring the Administra- tive Procedure Act in holding a challenge to publication premature because there existed informal, unpublished, <i>ad hoc</i> unexhausted procedures	20

	PAGE
III—The Census Act issue merits this Court's renewed attention	23
IV—The rulemaking issue poses important questions of federal law	25
V—The decision below violates constitutional criteria governing judicial enforcement of agency process established by this Court	26
VI—This Court should exercise its supervisory power to remedy the lower court's failure to apply the Federal Rules of Civil Procedure and to resolve the conflict with a decision of the Third Circuit created by that failure	27
VII—This Court should review for the first time the Comptroller General's responsibilities pursuant to the Federal Reports Act to review forms of independent agencies	28
Conclusion	29

TABLE OF AUTHORITIES

Cases:

	PAGE
Abbott Laboratories, Inc. v. Gardner, 387 U.S. 136 (1967)	25
Aluminum Co. of America v. FTC, 390 F. Supp. 301 (S.D.N.Y. 1975)	3
Aluminum Co. of America v. FTC, 67 F.R.D. 510 (S.D.N.Y. 1975)	3
A.O. Smith Corp. v. FTC, 530 F.2d 515 (3d Cir. 1976)	3
A.O. Smith Corp. v. FTC, 396 F. Supp. 1108 (D. Del. 1975)	3
A.O. Smith Corp. v. FTC, 396 F. Supp. 1125 (D. Del. 1975)	3
A.O. Smith Corp. v. FTC, 403 F. Supp. 1000 (D. Del. 1975)	3
A.O. Smith Corp. v. FTC, 417 F. Supp. 1068 (D. Del. 1976)	3
Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407 (1942)	25
Electric Bond Co. v. SEC, 303 U.S. 419 (1938)	18
Exxon Corp. v. FTC, 436 F. Supp. 1019 (D. Del. 1977)	20
FCC v. Schreiber, 381 U.S. 279 (1965)	18
Genuine Parts v. FTC, 445 F.2d 1382 (5th Cir. 1971)	21
Hannah v. Larche, 363 U.S. 420 (1960)	25
In re FTC Line of Business Report Litigation, 432 F. Supp. 274 (D.D.C. 1977)	3
In re FTC Line of Business Report Litigation, 432 F. Supp. 291 (D.D.C. 1977)	3

	PAGE
In re FTC Line of Business Report Litigation, 1977-2 CCH Trade Reg. Rep. ¶61,544 (D.D.C. 1977)	3
In re FTC Line of Business Report Litigation, 1977-2 CCH Trade Reg. Rep. ¶61,593 (D.D.C. 1977)	3
Nader v. Nuclear Regulatory Commission, 513 F.2d 1045 (D.C. Cir. 1975)	19
New Hampshire Fire Insurance Co. v. Scanlon, 362 U.S. 404 (1960)	27
Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946)	26
Red Lion Broadcasting Co. v. FTC, 395 U.S. 367 (1969)	25
Richardson v. United States, 465 F.2d 844 (3d Cir. 1972) (<i>en banc</i>), <i>cert. denied</i> , 410 U.S. 955 (1973) <i>rev'd on other grounds</i> , 418 U.S. 166 (1974)	27
See v. City of Seattle, 387 U.S. 541 (1967)	26
Service v. Dulles, 354 U.S. 363 (1957)	19
St. Regis Paper Co. v. United States, 368 U.S. 208 (1961)	4, 23
United States v. Morton Salt Co., 338 U.S. 632 (1950)	25
Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc., — U.S. —, 98 S.Ct. 1197 (1978)	19
Vitarelli v. Senton, 359 U.S. 535 (1959)	19

	PAGE
<i>Constitutions and Statutes:</i>	
United States Constitution Amend. IV	4
5 U.S.C. §§551 et seq.	5
5 U.S.C. §551(4)	17
5 U.S.C. §552(a)(1)	21
5 U.S.C. §552(a)(2)	21
5 U.S.C. §553	13
5 U.S.C. §554	17
13 U.S.C. §9	5, 16
15 U.S.C. §§41 et seq.	5, 8, 27
15 U.S.C. §46(b)	14
15 U.S.C. §46(f)	9, 16, 18
28 U.S.C. §1254(1)	3
28 U.S.C. §1361	27
44 U.S.C. §3512	5, 8, 10, 38
Appropriations Act, 88 Stat. 1822 (1974)	5, 18
Appropriations Act, 89 Stat. 611 (1975)	5, 18
Appropriations Act, 90 Stat. 937 (1976)	5, 18

	PAGE
 <i>Rules and Regulations:</i>	
Federal Rules of Civil Procedure	
Rule 1	5, 27
Rule 81(a)(3)	5, 27
Rule 81(b)	5, 27
4 C.F.R. §10.7(a)	28
Line of Business Confidentiality Rules, 39 Fed. Reg.	
30970 (1974)	5, 18
Line of Business Confidentiality Rules, 40 Fed. Reg.	
21542 (1975)	5, 18
Line of Business Confidentiality Rules, 40 Fed. Reg.	
42243 (1975)	5, 18
Line of Business Confidentiality Rules, 41 Fed. Reg.	
28041 (1976)	5, 18
 <i>Other Authorities:</i>	
H.R. Rep. No. 2437, 87th Cong., 2d Sess. 2 (1962)	24
Statement of Financial Accounting Standards No. 21,	
Financial Accounting Standards Board	13

INDEX TO APPENDIX OF STATUTES AND
REGULATIONS OF PETITION OF
MILLIKEN & COMPANY

	PAGE
Statutes	
Administrative Procedure Act, 5 U.S.C. §552	A1
Federal Trade Commission Act, 15 U.S.C. §46(f)	A2
Statutory LB Confidentiality Guarantee, 88 Stat. 1822 (1974)	A3
Statutory LB Confidentiality Guarantee, 89 Stat. 611 (1975)	A5
Statutory LB Confidentiality Guarantee, 90 Stat. 937 (1976)	A7
Rules and Regulation	
Line of Business Confidentiality Rules, 39 Fed. Reg. 30970 (1974)	A9
Line of Business Confidentiality Rules, 40 Fed. Reg. 21542 (1975)	A15
Line of Business Confidentiality Rules, 40 Fed. Reg. 42243 (1975)	A22
Line of Business Confidentiality Rules, 41 Fed. Reg. 28041 (1976)	A31

1897

1898

1899

1900

1901

1902

1903

1904

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**PETITION FOR A WRIT OF CERTIORARI
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Petitioner Milliken & Company (formerly Deering-Milliken, Inc.) ("Milliken") respectfully asks that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on July 10, 1978. This judgment affirms the enforcement by the United States District Court for the District of Columbia, in separate litigations, of orders to file special reports issued by the Federal Trade Commission in connection with two statistical reporting programs, one called the Corporate Patterns Report Program ("CPR") and the other called the Annual Line of Business Report Program ("LB"). This separate petition demonstrates that the Court of Appeals' ruling on issues

which particularly affect petitioner Milliken, one of the very few private companies in either program, ignores the applicable precedents of this Court and conflicts with prior decisions in other circuits. These issues which particularly affect Milliken involve whether or not it is premature to review judicially Milliken's claim that its confidential financial information will be unlawfully disclosed by the CPR and LB programs.¹

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals for the District of Columbia Circuit, dated July 10, 1978 and filed with the judgment² sought to be reviewed in this petition, is not yet reported. It is reproduced as Appendix 1 in the Appendix to the Petition of American Air Filter Company, et al. ("American Air Filter Petition").

Prior to that *per curiam* opinion, this litigation has been the subject of a total of eleven judicial decisions by the district courts for the District of Delaware (Schwartz, J.), the Southern District of New York (Weinfeld, J.), and the District of Columbia (Flannery, J.), and the Court of Ap-

1. This petition also seeks certiorari on issues which are common to all respondent companies in both the LB and CPR programs. We understand that two other petitions for writs of certiorari which address themselves to these common issues in detail are being filed by other corporate parties. On these common issues Milliken's interest in a writ of certiorari is identical with that of the other corporate parties.

2. The Court of Appeals rendered one judgment in several cases which had been consolidated below. Three of these cases were pre-enforcement actions captioned *Deering-Milliken, Inc. v. Federal Trade Commission, et al.* One case involved CPR, the second 1973 LB and the third 1974 LB. Two of the cases were enforcement actions with the FTC as petitioner and Milliken, *inter alia*, as a respondent. The petition seeks review of the issues in all five cases, as decided in the Court of Appeals' unitary judgment.

peals for the Third Circuit. The opinions are reported as follows:

A. O. Smith Corp. v. FTC, 396 F. Supp. 1108 (D. Del. 1975); *A. O. Smith Corp. v. FTC*, 396 F. Supp. 1125 (D. Del. 1975); *A. O. Smith Corp. v. FTC*, 403 F. Supp. 1000 (D. Del. 1975); *A. O. Smith Corp. v. FTC*, 530 F.2d 515 (3d Cir. 1976); *A. O. Smith Corp. v. FTC*, 417 F. Supp. 1068 (D. Del. 1976); *Aluminum Co. of America v. FTC*, 390 F. Supp. 301 (S.D.N.Y. 1975); *Aluminum Co. of America v. FTC*, 67 F.R.D. 510 (S.D.N.Y. 1975); *In re FTC Line of Business Report Litigation*, 432 F. Supp. 274 (D.D.C. 1977); *In re FTC Line of Business Report Litigation*, 432 F. Supp. 291 (D.D.C. 1977); *In re FTC Line of Business Report Litigation*, 1977-2 CCH Trade Reg. Rep. ¶61,544 (D.D.C. 1977); *In re FTC Line of Business Report Litigation*, 1977-2 CCH Trade Reg. Rep. ¶61,593 (D.D.C. 1977).

The Appendix to the American Air Filter Petition sets forth the text of the relevant opinions.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment sought to be reviewed was entered on July 10, 1978.

QUESTIONS PRESENTED

1. Is judicial review of the Federal Trade Commission's authority to publish financial data of a private company premature when sought in connection with the collection of those data if the Federal Trade Commission has

publicly stated that the purpose for collection is publication?³

2. Is judicial review of the Federal Trade Commission's authority to publish financial data of a private company premature when the private company, having thrice moved, pursuant to the Federal Trade Commission's published Rules of Practice and Procedure, not to have its data published, has not sought further to obtain relief from the Federal Trade Commission under informal, unpublished, and *ad hoc* procedures.³

3. Whether Section 9 of the Census Act, as amended to overrule this Court's decision in *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961), permits a federal agency to compel corporations to answer Census Bureau statistical questions for the purpose of obtaining the same specially compiled information as such corporations submitted to the Census Bureau.

4. Whether a federal agency's decision to undertake a broad-based data collection and publication program, unrelated to any enforcement or other regulatory proceeding, is subject to the rulemaking procedural requirements of the Administrative Procedure Act, 5 U.S.C. §553, when, according to the agency, the program is designed to achieve important policy goals affecting the structure of the national economy.

5. Whether the Fourth Amendment permits judicial enforcement of agency compulsory process without any evalu-

³ These questions are uniquely advanced in this petition. We understand that the remaining questions are also being raised by other petitioners.

ation of whether the relevance of the information justifies the burden of compliance imposed on the respondent.

6. Is the procedure in a district court to obtain the relief formerly available by a writ of mandamus governed by the Federal Rules of Civil Procedure under Rules 1 and 81(b), or is it subject to an exception under Rule 81(a)(3)?

7. Under the provisions of the Federal Reports Act, that an "independent regulatory agency shall make the final determination as to the necessity" of obtaining information, and that the Comptroller General "shall determine" the "appropriateness" of a proposed agency questionnaire, should the Comptroller General approve a form if he has not determined it will gather information that is meaningful and reliable for the agency's stated need?

STATUTES AND REGULATIONS

This case involves the following statutes:

Administrative Procedure Act, 5 U.S.C. §§551 et seq.
Census Act, 13 U.S.C. §9

Federal Trade Commission Act, 15 U.S.C. §§41 et seq.

Federal Reports Act, 44 U.S.C. §3512

Appropriations Acts, 88 Stat. 1822 (1974)

89 Stat. 611 (1975)

90 Stat. 937 (1976)

and regulations:

Line of Business Confidentiality Rules,

39 Fed. Reg. 30970 (1974)

40 Fed. Reg. 21542 (1975)

40 Fed. Reg. 42243 (1975)

41 Fed. Reg. 28041 (1976).

The Appropriations Acts, the Line of Business Confidentiality Rules and excerpts of the Administrative Procedure Act and Federal Trade Commission Act are set out in the Appendix to this Petition. Other relevant statutes are set out in connection with other Petitions being filed in this case.

STATEMENT OF THE CASE

The Parties

Milliken

This separate petition raises questions of unique concern to Milliken because of its special status, in addition to seeking certiorari on questions which affect all of the respondent companies.

Milliken is a textile company. It is also a private company, with no public shareholders. It is the only private company in the textile industry subject to the Federal Trade Commission's LB and CPR programs which are challenged in this case.⁴ Milliken's decision to remain privately held has denied it access to the public equity and debt markets, caused it to forego the opportunity to offer personnel stock options and similar incentives, and deprived it of the ability to make certain acquisitions on a tax-free basis.

Milliken has borne these disadvantages because, as a private company with a long history of family ownership, it has been able to keep financial and market information private. Milliken jealously guards information about its size, structure, operations and finances. It has never filed

4. We believe it is one of less than a dozen private companies in either program.

a registration statement, proxy statement, or annual report with the Securities and Exchange Commission ("SEC"). Any limited information made available outside Milliken has been under strict assurances of confidentiality and with safeguards appropriate to make those assurances meaningful. Within Milliken financial and market information is made available only on a "need to know" basis.

The textile industry is highly competitive and price sensitive. The fact that Milliken's competitors do not have access to information about Milliken while Milliken does have access to information about them gives Milliken a proper competitive edge in making certain kinds of decisions.

For example, relative market share information is the single most important factor in most major business decisions, including decisions about entering and leaving markets and about capital construction. Sales data are the essential element in calculating a company's relative market share. Because Milliken's sales are now unknown, competitors cannot accurately assess Milliken's share of those markets. Milliken's competitors cannot calculate whether their relative shares of those markets (*i.e.*, the ratio of Milliken's market share to any other competitor's market share) are larger or smaller than Milliken's share. Milliken, on the other hand, knows its own share of each market, the share of each of its competitors, and the relationship of its own market share to the market share of its competitors.

This disparity between what Milliken knows and what its competitors know has three effects. First, Milliken can

make decisions that its competitors are prevented from making by their lack of information. Second, there are some situations in which Milliken can make decisions to act while its competitors forbear because they are unsure of the quality of their estimates of data about Milliken. Third, there are many circumstances in which Milliken's decisions will be more accurate than its competitors' because it is better informed.

As we will set forth in greater detail below, the CPR program would, by unlawful publication of Milliken's individual data, destroy the edge that Milliken has obtained by forsaking the benefits discussed above at 6, and has worked hard to keep. The LB program would, by unlawful publication of aggregates containing financial data about Milliken, achieve the same effect.

Federal Trade Commission

The Federal Trade Commission (the "Commission" or "FTC") is an independent agency of the United States Government, 15 U.S.C. §§41 *et seq.* In addition to the Commission itself, its current officers are also parties.

General Accounting Office

The Comptroller General is a party because of his involvement in clearance of the LB and CPR Forms under the Federal Reports Act, 44 U.S.C. §3512.

The Programs

This case concerns two separate statistical reporting programs of the Commission, the Corporate Patterns Report Program and the Annual Line of Business Program.

Neither program is being conducted to support any specific law enforcement or regulatory activity of the FTC; nor are they intended to satisfy any Commission curiosity as to whether the respondents might have in some manner violated the law. Each respondent company, such as Milliken, was selected solely on the basis of objective statistical criteria, and not on the basis of any suspected wrongdoing. Each program, moreover, implements a number of significant policy judgments of the Commission that will have a substantial effect both on the rights of petitioners and on the public interest. These programs thus involve the exercise of agency process as a means, *inter alia*, of implementing these judgments, and are thus distinguishable from the typical exercise of agency process to aid the consideration of possible agency judgments yet to be made and implemented.

CPR Program

The FTC's Corporate Patterns Report Program implements a policy judgment that the collection and the publication of data specially prepared for submission to the Bureau of the Census is in the public interest, despite the fact that this judgment directly conflicts not only with the judgment of Congress in Section 9 of the Census Act assuring that individual responses to the Bureau of Census will not be disclosed to the public or used for enforcement or regulatory purposes, but also with the rights of private companies to keep their financial data private, guaranteed by Section 6(f) of the Federal Trade Commission Act (15 U.S.C. §46(f)).

The CPR program, at its inception, was intended to parallel the Bureau of the Census' Quinquennial Census of Manufactures, and is specifically intended to require the largest respondents to that Census Program to report their confidential Census responses, most significantly their value of shipments (which are roughly related to sales data), to the FTC for its internal enforcement and regulatory use and for ultimate publication to the general public. On January 22, 1978, the FTC requested the General Accounting Office ("GAO") to clear under the Federal Reports Act (44 U.S.C. §3512) its proposed CPR reporting forms. Clearance was granted by GAO only for the first cycle of CPR reports, and GAO severely criticized the Commission for its failure to use procedures suitable for the resolution of the numerous issues raised by the proposed program.

Census, the Office of Management and Budget ("OMB") and the Bureau of Economic Analysis ("BEA"), strenuously objected that the CPR program would have a serious adverse impact on the quality of Census data, which are required, in part, for the calculation of Gross National Product data. The Commission in September, 1975 nonetheless issued orders to over 1100 corporations directing them to file CPR reports. In doing so it also ignored requests by potential respondents that it first subject the program to notice and comment procedures.

Additionally, the Commission ignored special requests by Milliken to be excluded from the CPR program. Milliken requested exclusion because the Commission's intended publication of individual company CPR data would reveal information which is a trade secret because of Milliken's status as a private company. Census has offered to provide

the FTC with any aggregate data it needs for the textile industry. The one thing Census cannot do for the FTC, however, is publish individual company data. Thus, if the Commission cannot publish data, there will be no purpose to the Commission's collecting it directly from Milliken, as opposed to obtaining appropriate summaries from Census. These data are not now available about Milliken from any other source.

These initial CPR orders seek, *inter alia*, Census value of shipments data as reported to Census in 1972.⁵ Timely motions to quash these orders were filed by 390 companies, including Milliken, whose motion specifically raised the confidentiality issue.

LB Program

The LB program which, in the words of former FTC Chairman Lewis A. Engman, is the Commission's "most important single economic activity," is intended to be the vehicle by which the FTC brings about a restructuring of American industry. This is to be achieved by both the effects of LB data publication and the internal use of data in the enforcement selection process. To enable the Commission to collect the information that it believes will achieve its desired goal, the Commission has adopted novel and highly controversial reporting principles, and has defined reporting requirements to implement these principles.

Under the program, the Commission annually seeks financial data from a large number of companies to be re-

5. Although there are technical differences in the actual numbers sought, the FTC figures are simply mathematical derivations of the actual Census data reported, and do not reflect any material revision of these figures.

ported on an accounting basis different from their current accounting bases. The "LB data" to be generated and reported by individual companies are to be edited, aggregated, and published by the Commission for the announced purposes of aiding the Commission in its antitrust enforcement responsibility, academics in their studies of business, competitors in making market entry decisions, and investors in making investment decisions. Form LB itself begins with the statement "THE PURPOSE OF THIS REPORT is to enable the Federal Trade Commission *to publish* aggregate financial data for manufacturing industries." (Emphasis added.) Congress has explicitly required the FTC to adopt rules mandating that the individual company data received by the FTC are not to be used in connection with any FTC law enforcement investigation or adjudication. Indeed, not even the Commissioners themselves are permitted to see these individual company data. Only certain statistical and data processing employees are authorized to see individual company data.⁶ The Commission believes that through the self-executing effects that the annual publication of LB data aggregates will have on investment decision-making, as supplemented by its coordinate enforcement activities, it can bring about its intended restructuring of domestic industry.

The reporting requirements of the LB program require more than 450 of the nation's largest and most diversified manufacturing corporations to report "financial performance data," including revenues, costs, profits, assets, and other items of both financial and statistical data, on the

6. Thus, any data released even within the Commission staff (other than to the designated statisticians and data processors) or to the Commissioners is "published" for purposes of the confidentiality rules.

basis of approximately 260 "LB categories" defined by the FTC, which are supposed to resemble actual markets.

Both the SEC and Financial Accounting Standards Board ("FASB") have implemented line of business or segment accounting requirements. Neither the SEC's nor FASB's rules, however, impose a mandatory "market" structure like the FTC's, and neither apply to Milliken.⁷ Both the SEC and FASB, unlike the FTC, adopted their requirements after public notice and comment.

American industry, the accounting profession, the GAO and the Commission on Federal Paperwork have indicated to the FTC, *inter alia*, that its LB program is seriously flawed conceptually, that it is likely to do more harm than good, and that it imposes substantial reporting burdens that cannot be supported on any reasonable cost-benefit analysis. The GAO has expressed reservations about "whether any meaningful hypothesis could be tested by the data developed by the line-of-business program." The Commission on Federal Paperwork called for a "complete re-examination" of the program, after its own review of LB.

Despite the acknowledged fundamental policy objectives of the program and their expressly intended self-executing impact on the nation's economy, the FTC has refused over repeated objections since 1973 to follow the informal rule-making provisions of the Administrative Procedure Act ("APA") (5 U.S.C. §553) in formulating and adopting the program.

7. Milliken, as explained above at 6-7, is not within the SEC's jurisdiction. The FASB, in its Statement of Financial Accounting Standards No. 21, explicitly exempted private companies from its rules.

The Commission made its final decision to implement the LB program on March 26, 1974, but also stated it would hold, if requested, post-implementation hearings "[w]ith the understanding that the Commission would be receptive only to improving the quality of the data received and that the basic concept of LOB reporting [would] not [be] open to question. . . ."

On August 2, 1974, after the Commission received from GAO a qualified and limited clearance of the initial LB report form under the Federal Reports Act, the Commission issued orders, under the purported authority of Section 6(b) of the Federal Trade Commission Act (15 U.S.C. §46(b)), to approximately 350 corporations requiring them to complete the form for the 1973 reporting year⁸ of the program. More than 200 corporations, including Milliken, timely moved to quash these orders. Milliken specifically objected to its inclusion because of the special dangers the program posed to it as a private company.

In particular, Milliken argued that the aggregates of financial data from several companies, which the Commission intended to publish, could be separated out or disaggregated to reveal the data of a particular company. Milliken argued that because all of the other companies in the textile industry in the LB program are publicly owned, certain of their financial data from publicly available documents (such as annual reports and Forms 10-K of the SEC) could be subtracted from the FTC's published totals, leaving as a residue Milliken's financial data.

8. A reporting year under the program refers to the fiscal year for which a respondent's reported data purports to reflect the results of its operations and not the year in which the data is collected.

This disaggregation by subtraction would lay bare Milliken's hitherto confidential financial information in violation of statute and regulation and to Milliken's competitive detriment. Certain other mathematical techniques, including matrix analysis, would make even more data about Milliken available from FTC aggregates.

In late September 1974, the Commission denied the motions to quash, but granted leave to renew the motions, *inter alia*, on the issue of confidentiality of LB data. Milliken did renew its motion in October 1974, including in support of its disaggregation argument a demonstration by an expert of the special problems the program posed to Milliken. The Commission denied the renewed motions in January 1975.

After a ruling by the United States District Court for the District of Delaware that the corporate parties' rule-making claims had potential merit, the Commission in April 1976 initiated notice and comment proceedings on proposed technical revisions to its LB report form and instructions. The FTC again expressly limited those proceedings to the proposed revisions, and excluded comments on the conceptual underpinnings or policy objectives of the program.

In August 1975, after adopting those revisions with slight modification, and after obtaining GAO clearance of the revised LB report form, the Commission issued its second cycle of LB orders to some 450 corporations, including Milliken, requiring them to file LB reports for their 1974 fiscal years. Many companies again moved to quash. Milliken's motion again focused on the special dangers of the LB program to it as a private company. The FTC again rejected motions to quash these 1974 orders. The

Commission then withdrew its still pending 1973 orders, and moving to transfer this litigation begun, *inter alia*, under 28 U.S.C. §1321, from the Southern District of New York to the District of Columbia for consolidation with its proceeding to enforce this second set of orders. That enforcement proceeding had been begun by a "petition," instead of the usual summons and complaint. The FTC has since issued additional orders for the 1975 and 1976 reporting years, which were currently outstanding.

Litigation

The CPR and LB programs are distinct and have been litigated in separate sets of consolidated proceedings but, because of the similar issues that have been raised in both litigations, they have been considered in tandem by the courts. The Court of Appeals' decision and judgment that give rise to this petition thus rule on petitioners' claims as to both programs.

Milliken has continually asserted, in both the Commission and the courts, that its inclusion in the CPR program will result in the unlawful publication of its individual confidential financial data, which are trade secrets and protected from publication by Section 6(f) of the Federal Trade Commission Act (15 U.S.C. §46(f)). In LB, as explained earlier at 14-15, Milliken has argued its data will be revealed by disaggregation of what the FTC intends to publish.

Additionally, Milliken and other corporate parties have consistently asserted that the FTC is barred from duplicating a Census reporting program for the avowed purpose of overriding the confidentiality protection that Congress has sought to provide in Section 9 of the Census Act (13 U.S.C. §9).

Further, the corporate parties have also contended since 1973 that because both of these programs seek to implement by their own operation important FTC policy objectives of a legislative nature with a substantial impact on the public and individual respondents, rather than solely to obtain information for use in some future proceeding or for use in evaluating the extent to which there is compliance with the law, the Commission was obligated by Section 4 of the APA (5 U.S.C. §554) to use notice and comment procedures prior to their implementation. Finally, the lower courts treated both programs as routine, compulsory process, and improperly refused to weigh the relevance of the data, if any, against the cost of compliance.

The substantial impact of CPR is demonstrated by the repeated concerns expressed by Census, OMB, and BEA. The substantial impact of LB is demonstrated by the FTC's own claim of a self-executing impact on the structure and performance of American industry. Moreover, the LB program involves a prescription of reporting principles and reporting requirements that fall within the APA's definition of a rule, which includes the "approval or prescription for the future . . . of valuations, costs, or accounting or practices bearing on any of the foregoing. . . ." 5 U.S.C. §551(4).

REASONS FOR GRANTING THE WRIT

I

The decision below improperly ignored the prior decisions of this Court in holding a challenge to publication premature because it was raised as an objection to data collection.

Milliken, as a privately held company, challenged in the courts below the lawfulness of the Commission's intention to publish LB and CPR data. In the LB litigations, Milliken contended that the publications the Commission contemplated would violate explicit statutory language assuring the confidentiality of Milliken's data, as well as the Commission's own regulations adopted pursuant to that statutory mandate.⁹ In the CPR litigations Milliken contended that the language of Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. §46(f), explicitly prohibited the publication of its CPR financial data, because they are trade secrets.

The Court of Appeals refused to consider these arguments. Instead it agreed with the District Court that consideration of the Commission's authority to publish was premature when raised as a challenge to the Commission's authority to collect data. The Court of Appeals relied on *Electric Bond Co. v. SEC*, 303 U.S. 419 (1938) and *FCC v. Schreiber*, 381 U.S. 279 (1965).¹⁰

9. Appropriations Acts, 88 Stat. 1822, 1841 (1974); 89 Stat. 611, 634-35 (1975); 90 Stat. 937, 956 (1976); Confidentiality Rules, 39 Fed. Reg. 30970 (1974); 40 Fed. Reg. 21542 (1975); 40 Fed. Reg. 42243 (1975); 41 Fed. Reg. 28041 (1976).

10. In CPR the District Court did require the Commission to give ten days' notice to objecting corporate parties before publication, yet did not do so in LB. The Court of Appeals affirmed this unexplained inconsistency.

Neither LB nor CPR is like the data collection efforts in *Electric Bond* or *Schreiber*. The LB and CPR programs are free standing statistical programs. One of their chief purposes as stated by the Commission is publication.¹¹ These statements of purpose by the Commission limit its own discretion. The courts have long held that the legality of an agency's activities are to be judged not by its potential statutory authority, but rather by the actual authority invoked by the agency subject to any self-imposed limitations. See, e.g., *Service v. Dulles*, 354 U.S. 363 (1957); *Vitarelli v. Senton*, 359 U.S. 535 (1959); *Nader v. Nuclear Regulatory Commission*, 513 F.2d 1045 (D.C. Cir. 1975).

Under *Service* and *Vitarelli*, if the FTC lacks authority to publish LB or CPR data, it likewise lacks the authority to collect them because its avowed purpose for collection is publication. By deciding otherwise the courts below not only ignored the applicable precedents of this Court that define the scope of judicial review of administrative action, but they also usurped a decision the Commission never made—to collect LB and CPR data even if those data could never be published. See *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*, — U.S. —, 98 S. Ct. 1197 (1978).

In both *Electric Bond* and *Schreiber* there was not the nexus between publication and collection which the FTC

11. In LB, disclosure of individual company data to anyone other than designated statistical and data processing employees of the Commission (i.e., to anyone who can do anything with the data, including the Commissioners themselves) is prohibited and thus constitutes "publication."

In CPR, as explained above at 10-11, for any purpose other than publication of individual company data, the Commission can obtain what it needs from Census.

has created in the LB and CPR programs. In *Electric Bond*, the SEC had not collected the data for the purpose of publication; its purpose was investigation of compliance with the law. Likewise, *Schreiber* involved an investigatory subpoena. In both cases the agencies' purpose in collection would have been fulfilled even if a subsequent challenge to publication was successful. In the cases at bar, a successful challenge to publication would *nunc pro tunc* make the original decision to collect irrational in the context of the Commission's expressed goals.¹²

II

The decision below conflicts with the decision of the Fifth Circuit in *Genuine Parts Co. v. FTC* by improperly ignoring the Administrative Procedure Act in holding a challenge to publication premature because there existed informal, unpublished, *ad hoc* unexhausted procedures.

The Court of Appeals ruled also that Milliken's challenges to the LB and CPR programs were premature because Milliken could file, with completed copies of Form CPR and 1974 Form LB, statements indicating why its data could not be published. This ruling relied on an informal practice set forth in the FTC's Operating Manual for requesting confidential treatment of submissions to the Commission. This practice was first identified in the Commission's reply brief in the Court of Appeals. That reply brief necessarily conceded, however, that the FTC's "present

12. Cf. *Exxon Corp. v. FTC*, 436 F. Supp. 1019, 1023 (D. Del. 1977).

regulations do not . . . provide" for any such procedure.¹³ Relying on this informal practice, the Court of Appeals barred Milliken's challenge for failure to exhaust.

In *Genuine Parts Co. v. FTC*, 445 F.2d 1382, 1393-94 (5th Cir. 1971), the Fifth Circuit held that there is no need to exhaust an administrative procedure that, as here, has not been published in the Federal Register, even if the Commission has formally amended its rules to adopt the procedure after the institution of the litigation. Rejection of the Commission's position follows *a fortiori* from *Genuine Parts*, since there the agency had actually amended its regulations to adopt the administrative procedure in question before the case was heard on appeal. Here, the Commission did not include the confidentiality procedure in its regulations even when the case was heard on appeal.

Genuine Parts was correctly decided. Its result is mandated by the APA in 5 U.S.C. §552(a)(1) which provides:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

* * *

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be ob-

13. While acknowledging that the Operating Manual had not been published in the Federal Register, the Commission referred to the Operating Manual as a "public document," but did not specify in what sense this was so. Perhaps the Commission meant that it was available upon request under 5 U.S.C. §552(a)(2).

tained, and instructions as to the scope and contents of all papers, reports, or examinations;

* * *

Except to the extent that a person has actual and timely notice of the terms thereof, *a person may not* in any manner be required to resort to, or *be adversely affected by, a matter required to be published in the Federal Register and not so published . . .* (emphasis added).

Thus, only by ignoring the Fifth Circuit's decision in *Genuine Parts* and the APA was the Court of Appeals for the District of Columbia Circuit able to hold Milliken's confidentiality claim premature for failure to exhaust an informal, *ad hoc* remedy that had never been published in the Federal Register.

Further, since Milliken thrice¹⁴ moved to quash Forms LB, each time raising the confidentiality issue, the purpose of the exhaustion doctrine (*i.e.*, due notice to the administrative agency to correct its error) has long ago been served.¹⁵

14. It did so first in an original motion to quash 1973 Form LB, then in a renewed motion and last in a motion to quash 1974 Form LB.

15. The confidentiality section of the Court of Appeals' opinion makes passing reference to a "presumption of administrative regularity," without citation of authority. Whatever that presumption may stand for as an evidentiary matter in a hearing on the merits, surely that presumption does not stand for the proposition that the only time confidentiality claims can be reviewed is after the Commission lets the cat out of the bag.

III

The Census Act issue merits this Court's renewed attention.¹⁶

Prior to *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961), lower federal courts in an unbroken line of cases had applied Section 9 of the Census Act, which by its literal language protected respondent information only from disclosure by Census, to data retained by respondents to the extent the data had been compiled "in the particular manner" necessary to meet special Census requirements. A majority of this Court in *St. Regis Paper* sustained the Second Circuit's narrow limitation of the Census privilege to the statute's literal language, and thus held that the FTC could exercise its subpoena powers to obtain file copies of Census reports directly from respondents.

Mr. Justice Black, joined by Mr. Justice Whittaker and Mr. Justice Stewart, dissented, applying the broader rule. Justice Black observed that (*id.* at 209):

Our Government should not, by picayunish haggling over the scope of its promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their Government.

It was this fair and sensible view that Congress sought to restore in amending Section 9 to protect specifically file

16. On the remaining issues, Milliken's arguments for a writ of certiorari are the same as those of the rest of the corporate parties.

copies retained by Census respondents. H.R. Rep. No. 2437, 87th Cong. 2d Sess. 2 (1962). In rejecting petitioners' contentions, the District of Columbia Circuit resorted to the crabbed "plain-meaning" construction of the Second Circuit and the majority of this Court in *St. Regis Paper*.

A writ of certiorari should issue here to determine whether the authority of the FTC to override the statutory policy of Section 9 of the Census Act to protect an individual respondent's specially prepared Census data from disclosure was properly sustained. The record in this case, including the affidavits of two successive directors of the Bureau of Census, demonstrates that this result is likely to cause a serious deterioration in the quality of data that Census collects, and that, in turn, it is likely to impair the ability of the government to deal effectively with basic economic problems confronting the nation such as persistent "stagflation." As the Secretary of Commerce has stressed, this litigation raises "very important issues of public policy."¹⁷

A grant here is particularly appropriate as this is the Court's first opportunity to construe the *St. Regis Paper* amendment to Section 9 of the Census Act.

17. The public importance of this case was recognized by the stay entered temporarily by the Chief Justice on October 26, 1977, and then extended by Mr. Justice Brennan on November 7, 1977, pending disposition in the Court of Appeals.

IV

The rulemaking issue poses important questions of federal law.

This Court has always been alert to assure that important substantive agency decisions do not escape either procedural requirements of law in their adoption or the appropriate standards of judicial review thereafter. *See e.g., Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 406 (1942); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136 (1967). This case presents the novel question whether substantive policy implemented by means of agency process is exempt from the procedures specified by Section 4 of the APA.

If the Court of Appeals' decision is permitted to stand, such policy implementation will be exempt solely because of its form: the simultaneous issuance of agency process to a large number of individual respondents. Implementation will thus be within the extremely broad discretion of an administrative agency subject only to the very limited standards of summary judicial review articulated by this Court in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950).

The principles of judicial deference and summary enforcement, which are intended to prevent the premature and undue involvement of the courts in administrative enforcement, regulatory, or investigatory activities (*see generally, Hannah v. Larche*, 363 U.S. 420, 446-47 (1960)) simply do not apply here where substantive policy is being imple-

mented through the use of agency process. Certiorari should be granted to assure that the intrinsically important policies at issue here are subjected to the APA's familiar requirements of preimplementation reasoned decision-making.

Moreover, it is important that this Court furnish guidance on the extent to which Section 4 applies to information gathering activities for the benefit of the many federal agencies that have information gathering powers.

V

The decision below violates constitutional criteria governing judicial enforcement of agency process established by this Court.

The role of the courts in reviewing the relevance and burdensomeness of agency process before enforcing it is, in the words of this Court, "neither minor nor ministerial." *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 217 (1946).

The courts below, however, ignored this injunction. They failed to balance the relevance of the LB and CPR programs to the FTC's purpose against the burden of the programs on corporate respondents. *See, See v. City of Seattle*, 387 U.S. 541, 544 (1967). Further, as discussed earlier at 19, they failed to look at the narrow purposes articulated by the FTC in adopting LB and CPR; they looked instead at the broad statutory authority of the FTC.

Thus, the courts below abdicated their duty to review the FTC's use of its compulsory process power in this case, ignored this Court's constitutional decisions and deferred improperly to the FTC.

VI

This Court should exercise its supervisory power to remedy the lower courts' failure to apply the Federal Rules of Civil Procedure and to resolve the conflict with a decision of the Third Circuit created by that failure.

When the Federal Trade Commission Act (15 U.S.C. §§41 et seq.) was adopted, compulsory process was enforced by writ of mandamus. Now that writs of mandamus have been abolished, the corporate parties contend that compulsory process should now be enforced in a plenary civil action pursuant to Federal Rules of Civil Procedure 1 and 81(b). The FTC contends that Federal Rule of Civil Procedure 81(a)(3) exempts it from the requirement of commencing a civil action by summons and complaint. The District Court and Court of Appeals adopted the FTC's view.

This Court, in *New Hampshire Fire Insurance Co. v. Scanlon*, 362 U.S. 404 (1960), noted that summary process is disfavored; full civil proceedings are favored. In *Richardson v. United States*, 465 F.2d 844, 855 (3d Cir. 1972) (*en banc*), *cert. denied*, 410 U.S. 955 (1973), *rev'd on other grounds*, 418 U.S. 166 (1974), a proceeding for mandamus under 28 U.S.C. §1361, the Third Circuit ruled that a plenary civil action was required.

In order to resolve the conflict between the holding in this case and the holding in *Richardson*, and to resolve an important question of federal law, this Court should, in its role as a supervisor of the federal courts, grant a writ of certiorari on this issue.

VII

This Court should review for the first time the Comptroller General's responsibilities pursuant to the Federal Reports Act to review forms of independent agencies.

Both Section 3512(d) of Title 44 of the United States Code and Title 4, Section 10.7(a) of the Code of Federal Regulations require the Comptroller General to consider the appropriateness of forms for the collection of information when reviewing those forms for clearance pursuant to the Federal Reports Act.

The Court of Appeals characterized Section 3512(d) as a "shorthand reference . . . [to] the [Comptroller's responsibility to] inspect the . . . information-gathering proposal with a view toward minimizing compliance burden." Yet elsewhere in the Federal Reports Act (§3512(b)) the Comptroller is given precisely this responsibility to review burden. Since the Court of Appeals has read "appropriateness" in Section 3512(d) to mean the same thing as "minimizing compliance burden" in Section 3512(b), it has eliminated part of the review which Congress intended the Comptroller General to undertake. Thus, it has raised an important question of federal law upon which this Court has not yet ruled, and ought to.

Conclusion

For the foregoing reasons, this Court should grant the petition and issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

July 28, 1978
New York, New York

Respectfully submitted,

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IN THE
Supreme Court of the United States
October Term, 1978

No. 78-

DEERING-MILLIKEN, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION, *et al.*,

Respondents.

**APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**



Administrative Procedure Act
5 U.S.C. §552

§552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

* * *

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

* * *

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

**Federal Trade Commission Act
15 U.S.C. §46(f)**

§46. Additional powers of Commission

The Commission shall also have power—

• • •

PUBLICATION OF INFORMATION; REPORTS

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

**Statutory LB Confidentiality Guarantee
88 Stat. 1822 (1974)**

PUBLIC LAW 93-563—Dec. 31, 1974

Public Law 93-563

AN ACT

Making appropriations for Agriculture-Environmental and Consumer Protection programs for the fiscal year ending June 30, 1975, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for Agriculture-Environmental and Consumer Protection programs for the fiscal year ending June 30, 1975, and for other purposes; namely:

* * *

[88 Stat. 1840]

FEDERAL TRADE COMMISSION

For necessary expenses of the Federal Trade Commission, other than line-of-business reports provided for in the following paragraphs; including uniforms or allowances therefor, as authorized by 5 U.S.C. 5901-5902; services as authorized by 5 U.S.C. 3109; hire of passenger motor vehicles; and not to exceed \$1,500 for official reception and representation expenses; \$37,593,000, of which \$650,000 shall be available for development of a computerized evidentiary indexing and retrieval capability, and \$1,364,000 shall be available for the congressionally-mandated study of the energy industry.

[88 Stat. 1841]

\$305,000, the amount of the budget requested, is hereby appropriated for the purpose of collecting line-of-business data from not to exceed 500 firms, as determined by the Federal Trade Commission.

No part of these funds may be used to pay the salary of any employee, including Commissioners, of the Federal Trade Commission who—

(1) uses the information provided in the line-of-business program for any purpose other than statistical purposes. Such information for carrying out specific law enforcement responsibilities of the Federal Trade Commission shall be obtained under existing practices and procedures or as changed by law; or

(2) makes any publication whereby the line-of-business data furnished by a particular establishment or individual can be identified; or

(3) permits anyone other than sworn officers and employees of the Federal Trade Commission to examine the line-of-business reports from individual firms.

**Statutory LB Confidentiality Guarantee
89 Stat. 611 (1975)**

Public Law 94-121 [H.R. 8121]; Oct. 21, 1975

**DEPARTMENT OF STATE, JUSTICE, AND
COMMERCE, THE JUDICIARY AND
RELATED AGENCIES
APPROPRIATION ACT, 1976**

An Act making appropriations for the Departments of State, Justice, and Commerce, the Judiciary, and related agencies for the fiscal year ending June 30, 1976, and the period ending September 30, 1976, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Departments of State, Justice, and Commerce, the Judiciary, and related agencies for the fiscal year ending June 30, 1976, and the period ending September 30, 1976, and for other purposes, namely:

* * *

[89 Stat. 634]

FEDERAL TRADE COMMISSION

SALARIES AND EXPENSES

For necessary expenses of the Federal Trade Commission, including uniforms or allowances therefor, as authorized by 5 U.S.C. 5901-5902; services as authorized by 5 U.S.C. 3109; hire of passenger motor vehicles; and not to

exceed \$1,500 for official reception and representation expenses; \$45,927,000.

No part of these funds may be used to pay the salary of any employee, including Commissioners, of the Federal Trade Commission who—

(1) makes any publication based on the line-of-business data furnished by individual firms without taking reasonable precautions to prevent disclosure of the line-of-business data furnished by any particular firm; or

(2) permits anyone other than sworn officers and employees of the Federal Trade Commission to examine the line-of-business reports from individual firms; or

[89 Stat. 635]

(3) uses the information provided in the line-of-business program for any purpose other than statistical purposes. Such information for carrying out specific law enforcement responsibilities of the Federal Trade Commission shall be obtained under existing practices and procedures or as changed by law.

For "Salaries and expenses", including \$375 for official reception and representation expenses, for the period July 1, 1976, through September 30, 1976, \$12,000,000.

**Statutory LB Confidentiality Guarantee
90 Stat. 937 (1976)**

**PUBLIC LAW 94-362 [H.R. 14239] ; July 14, 1976
DEPARTMENTS OF STATE, JUSTICE, AND
COMMERCE, THE JUDICIARY, AND
RELATED AGENCIES
APPROPRIATIONS ACT, 1977**

An Act making appropriations for the Departments of State, Justice, and Commerce, the Judiciary, and related agencies for the fiscal year ending September 30, 1977, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be appropriated, out of any money in the Treasury not otherwise appropriated, for the Departments of State, Justice, and Commerce, the Judiciary, and related agencies for the fiscal year ending September 30, 1977, and for other purposes, namely:

* * *

[90 Stat. 956]

**FEDERAL TRADE COMMISSION
SALARIES AND EXPENSES**

For necessary expenses of the Federal Trade Commission, including uniforms or allowances therefor, as authorized by 5 U.S.C. 5901-5902; services as authorized by 5 U.S.C. 3109; hire of passenger motor vehicles; and not to exceed \$1,500 for official reception and representation expenses; \$52,700,000.

No part of these funds may be used to pay the salary of any employee, including Commissioners, of the Federal Trade Commission who—

(1) makes any publication based on the line-of-business data furnished by individual firms without taking reasonable precautions to prevent disclosure of the line-of-business data furnished by any particular firm; or

(2) permits anyone other than sworn officers and employees of the Federal Trade Commission to examine the line-of-business reports from individual firms; or

(3) uses the information provided in the line-of-business program for any purpose other than statistical purposes. Such information for carrying out specific law enforcement responsibilities of the Federal Trade Commission shall be obtained under existing practices and procedures or as changed by law.

Line of Business Confidentiality Rules
39 Fed. Reg. 30970 (1974)

FEDERAL TRADE COMMISSION

LINE-OF-BUSINESS REPORTING PROGRAM

*Resolution Requiring Annual Reports From
Corporation; Correction*

In FR Doc. 74—19394 appearing on page 30377 of the issue for Thursday, August 22, 1974, following the last line (the words *Acting Secretary.*) the rules and procedures set forth below should be inserted:

RULES AND PROCEDURES FOR THE USE OF CONFIDENTIAL INDIVIDUAL COMPANY DATA COLLECTED UNDER THE FTC'S LINE OF BUSINESS REPORT PROGRAM

Data collected under the Line of Business Report Program are gathered for the purpose of preparing statistical compilations, consistent with the confidentiality strictures contained herein. Under no conditions are the individual company reports to be inspected or otherwise used for "taxation, regulation or investigation" or in any Commission adjudication or in connection with any investigation for the purpose of initiating adjudicative proceedings.¹ While the Commission intends to utilize tabulations of Line of Business data in an annual Line of Business Report, the FTC series on aggregate concentration, and such other statistical and economic reports as are authorized by the Commission, no individual company data contained in the Line of Business Reports will be revealed in these reports prepared by

1. Except where the latter relate to legal action initiated because of the refusal of a respondent company to file a timely and acceptable Line of Business report.

the FTC. However, these FTC reports may be utilized in connection with any Commission adjudication or any investigation for the purpose of initiating adjudicative proceedings.

The names of companies, financial data and all the other information which are obtained from respondent companies in connection with the Federal Trade Commission's Line of Business Reporting Program are confidential, and persons authorized to have access to this information may not release, discuss or in any way provide access to such information to anyone not authorized to have access. Further, all such Line of Business data are considered to be exempt from the disclosure provisions of the Freedom of Information Act. Penalties under Section 10 of the Federal Trade Commission Act provide for fines up to five thousand dollars (\$5,000) or imprisonment not exceeding one year for unauthorized release of such information.

Authorized access and use. Access to and use of individual company data is restricted to members of the Division of Financial Statistics and the Statistical Reports Unit of the Economic Research and Services Section, both of which are part of the Bureau of Economics and both of which have no involvement in any investigative or regulatory functions of the Federal Trade Commission. Access by members of the Division of Management is authorized only during and for the purpose of electronic processing of such data.

The Division of Financial Statistics is a statistics-gathering unit which prepares for publication the Quarterly Financial Report and the Line of Business Report. All mailing of reporting forms and correspondence relating to

individual Line of Business companies (except for correspondence involving legal action for failure to submit reports) will be under the supervision of the Chief of the Division of Financial Statistics. That division is responsible for reviewing, editing and coding all individual company reports and for requesting such tabulations and listings of individual company data from the Division of Management as needed to prepare the Line of Business Report. The Financial Statistics Division is responsible for the selection and maintenance of the Line of Business survey panel. The Chief of the Division of Financial Statistics is responsible for the development and implementation of disclosure analysis procedures applied to all Line of Business data. He shall certify to the Director of the Bureau of Economics that he has reviewed and approved all disclosure analysis procedures used in the Line of Business publication tables and all other tabulations involving Line of Business source data.

The Statistical Reports Unit is a statistical research and economic analysis unit in the Office of the Director, Bureau of Economics, and is responsible for: The preparation of FTC merger statistical reports, the annual FTC statistics on aggregate concentration, the FTC report on rates of return in selected manufacturing industries, and other statistical and economic reports authorized by the Commission. The head of the Statistical Reports Unit shall request from the Division of Financial Statistics such access to individual company Line of Business data as is needed to complete Bureau of Economics reports, after receiving concurrence from the Chief of Financial Statistics Division that the table plans and disclosure analysis procedures to be

used in preparing these FTC reports are consistent with the Line of Business procedures and adequate to protect against direct or residual disclosure that could result from such additional tabulation of Line of Business data. He will certify to the Director of the Bureau of Economics that he has subjected all tables in these reports which in any way used Line of Business data to the above-described disclosure analysis.

The Director of the Bureau of Economics will not have access to the individual Line of Business schedules nor the derived data listings for individual companies utilized by these statistical units. He shall, however, have supervisory responsibility and authority with respect to the units. Such responsibility and authority shall include approving any reports prepared by them, making recommendations with respect to the preparation of such reports, and exercising any other supervisory control not requiring access to the individual Line of Business data.

Under no conditions may the individual company data reported on the Line of Business schedule be used for, or in the course of, any enforcement action or enforcement investigation. Therefore, all persons not on the staffs of the Statistical Reports Unit or Division of Financial Statistics will not be granted access to individual company information in the Line of Business files or data records; nor will personnel from either of these two units engage in any activity of the Commission which involves regulation or investigation, nor prepare any reports utilizing Line of Business data for such purposes while assigned to these units. Any employee who transfers into or out of either of the units will be formally notified in writing that he is

subject to Section 10 of the Federal Trade Commission Act and to these Rules, which prohibit disclosure, discussion, or release of these data to any unauthorized person.

Security of individual company Line of Business data. All individual company Line of Business schedules and data records at the Federal Trade Commission must at all times be under the security and supervision of the staff of either the Statistical Reports Unit or the Division of Financial Statistics, except during electronic data processing when the Chief, Division of Management, shall be responsible for their security.

All rooms containing individual company Line of Business data will be locked except when occupied. The individual company data will be stored in secured drawers, files, etc., except when being used.

The Chief of the Commission's Division of Management shall be responsible for the security of the original Line of Business schedules and all derived punched cards and computer records being processed. All punched cards, tapes, printouts, and containers for same, will be conspicuously marked "confidential." The Chief of the Division of Management will be responsible for the security of data in his possession and will personally approve all storage locations and security procedures, subject to concurrence of the Chief, Financial Statistics Division. He will not permit any special tabulations or listings of Line of Business data except those specifically approved by the Director of the Bureau of Economics, and for which disclosure analysis procedures have been reviewed and concurred in by the Chief of the Financial Statistics Division for consistency

with existing Line of Business disclosure analysis procedures. Except for magnetic storage media used in processing, all cards, tapes and printouts containing individual company Line of Business data will be sent to the Division of Financial Statistics for secure storage, along with the original Line of Business schedules.

All persons having use or possession of individual company data will be personally responsible for securing the confidentiality of those data and for following the rules set forth above. Any violation of these rules, either through neglect or otherwise, will result in prosecution to the full extent of the law or any other legal action decided on by the Chairman of the Commission.

VIRGINIA HARDING,
Acting Secretary.

AUGUST 2, 1974.

**Line of Business Confidentiality Rules
40 Fed. Reg. 21542 (1975)**

FEDERAL TRADE COMMISSION

LINE-OF-BUSINESS REPORTING PROGRAM

*Confidentiality Rules and Procedures for the
1974 Reporting Year*

Notice is hereby given that the Federal Trade Commission has approved and adopted certain rules and procedures hereinafter set forth prescribing the confidential handling and use of reports to be filed by companies pursuant to an Order to File Special Report under the Line of Business Program. The rules and procedures shall apply to reports relating to the 1974 reporting year. They do not apply to reports relating to the 1973 reporting year the confidentiality of which are governed by the Rules and Procedures for the Use of Confidential Individual Company Data Collected Under the FTC's Line of Business Report Program issued in connection with the Commission's Resolution Requiring Annual Line of Business Reports from Corporations, dated August 2, 1974, and published in the **FEDERAL REGISTER** on August 27, 1974 (39 FR 30970).

Definitions: For purposes of these Rules and Procedures, the following definitions apply:

“LB Report” means a report filed by a company pursuant to an Order to File Special Report under the Line of Business (LB) Program.

“Reporting Company” means a company ordered to file an LB Report.

Confidentiality of LB Reports With Respect to Persons Outside the Commission: Pub. L. 93-563, which provides Federal Trade Commission appropriations for the fiscal year 1975 states in part that:

No part of these funds may be used to pay the salary of any employee, including Commissioners, of the Federal Trade Commission who—

* * *

(3) permits anyone other than sworn officers and employees of the Federal Trade Commission to examine the line-of-business reports from individual firms.

The Commission interprets this provision as prohibiting disclosure of LB Reports to any person outside the Commission including Congress, parties in court proceedings, governmental agencies and members of the public so long as the provision remains in[, or a] substantially similar provision [remains] in effect. Accordingly, during the period this provision or a substantially similar provision in subsequent appropriations acts for the Federal Trade Commission remains in effect, LB Reports will not be disclosed to any person outside the Commission except pursuant to a superseding act of Congress; or pursuant to an order of a court but only after a motion by the Commission to quash and for a protective order have been disposed of by the court. In the event that the Commission receives a subpoena for an LB Report, it will promptly notify the Reporting Company.

Under section 10 of the Federal Trade Commission Act, any officer or employee of the Commission who shall make public any information obtained by the Commission, without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor and upon conviction thereof, may

be punished by a fine not exceeding five thousand dollars (\$5,000) or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

Confidentiality of LB Reports Within the Commission: Access to and use of LB Reports within the Commission shall be restricted as hereinafter set forth, and persons authorized to have access thereto and use thereof shall not release any LB Report, or in any way provide access thereto, to anyone not authorized to have access. LB Reports shall be used to compile statistical and other economic reports authorized by the Commission. The latter reports may be utilized in connection with any Commission investigation or proceeding for carrying out specific law enforcement responsibilities of the Commission. However, they shall not be compiled in such a way that LB data furnished by a particular Reporting Company can be identified. LB Reports shall not be made available to any person within the Commission for use in connection with any Commission investigation or proceeding for carrying out specific law enforcement responsibilities of the Commission. However, this restriction shall not limit the authority of the Commission to require by subpoena or other compulsory process the production of any information or data from any source outside the Commission for use in connection with an investigation or proceeding for carrying out specific law enforcement responsibilities of the Commission.

Except as hereinafter provided, access to and use of LB Reports within the Commission shall be restricted to the Division of Financial Statistics, Bureau of Economics; the Statistical Reports Unit of the Economic Research and Services Section, Bureau of Economics; and the Division of Management as hereinafter set forth.

The Division of Financial Statistics plans, develops and prepares for publication statistical and other economic reports such as the Quarterly Financial Report and the Annual Line of Business Report. The Division shall have access to and use of LB Reports for planning, developing and preparing such statistical and economic reports. Procedures sufficient to assure that LB data furnished by a particular Reporting Company cannot be identified shall be developed and implemented by that Division in connection with each statistical or other economic report to be published which is derived from LB data. With respect to each such report, the Assistant Director for Financial Statistics shall certify to the Director, Bureau of Economics, that he has reviewed and approved the procedures applied thereto.

The Statistical Reports Unit of the Economic Research and Services Section, Bureau of Economics, plans, develops and prepares for publication reports such as merger statistical reports, annual statistics on aggregate concentration and other statistical and economic reports authorized by the Commission. The Unit shall have access to and use of LB Reports for planning, developing or preparing such statistical and economic reports. Publication of any report which is derived from LB data shall be conditioned upon a determination by the Assistant Director for Financial Statistics that the procedures applied therein are sufficient to assure that LB data furnished by a particular Reporting Company cannot be identified, and certification of his determination to the Director, Bureau of Economics.

The Division of Management shall have access to LB Reports but only during and for the purpose of electronic processing of information and data contained in LB Re-

ports. The Division may employ the services of an outside computer facility for purposes of computer processing of LB data subject to the restriction that no one other than authorized employees of the Federal Trade Commission may examine the LB Reports from individual Reporting Companies.

Employees of the Division of Financial Statistics and the Statistical Reports Unit of the Economic Research and Services Section, while assigned to either of these units, shall not participate in any Commission investigation or proceeding for carrying out specific law enforcement responsibilities of the Commission. Any employee who transfers into or out of either of these units shall be formally notified in writing that he is subject to these Rules and Procedures and to section 10 of the Federal Trade Commission Act.

The Director, Bureau of Economics, shall not have access to LB Reports. He shall, however, have supervisory responsibility and authority with respect to the Division of Financial Statistics and the Statistical Reports Unit of the Economic Research and Services Section. Such responsibility and authority shall include approving any reports prepared by them, making recommendations with respect to the preparation of such reports, and exercising any other supervisory control not requiring access to LB Reports.

Upon notification to the General Counsel by the Assistant Director for Financial Statistics that a Reporting Company has failed adequately to comply with an Order to File Special Report under the LB Program, the following additional Commission officers and employees shall have access to such parts of that company's LB Report required to

evaluate the noncompliance and to advise and represent the Commission with respect to any proceeding initiated because of a refusal or failure of the Reporting Company to file an adequate LB Report: the General Counsel and his staff and the Commissioners and their assistants.

Security of LB Reports: All Commission members and employees authorized to have access to and use of LB Reports as hereinbefore provided shall, while in possession of any such material, be personally responsible for ensuring that unauthorized personnel do not obtain access to such material and for observing the following procedures:

1. All LB Reports and reproductions of LB data from individual Reporting Companies (such as tabulations, punch cards, tapes or printouts, etc.) shall be conspicuously marked "Confidential".

2. All rooms containing LB Reports and reproductions of LB data from individual Reporting Companies shall be locked except when occupied.

3. All LB Reports and reproductions of LB data from individual Reporting Companies shall be stored in locked drawers, files or cabinets except when being used.

4. All LB Reports and reproductions of LB data from individual Reporting Companies shall be returned to the Division of Financial Statistics immediately after any authorized use of such material is no longer required.

Limitations: The Rules and Procedures set forth above shall not apply to:

(1) disclosure to a court of an LB Report of a Reporting Company in connection with a proceeding initiated because of a refusal or failure of that company to file an adequate LB Report;

(2) the identity of a Reporting Company;

(3) information or data furnished by a Reporting Company in a context other than an LB Report (e.g., a motion to quash or other motion challenging an Order to File Special Report under the LB program); such information or data shall be treated as confidential pursuant to §§ 1.10-4.11 of the Commission's procedures and rules of practice only upon request with a showing of justification therefor, and a determination by the Commission, with due regard to statutory restrictions, the Commission's procedures and rules of practice and the public interest, that such information or data should not be made public;

(4) information or data which (a) are in the public domain, (b) enter the public domain from a source other than the Commission or its employees, (c) were in the Commission's possession prior to transmission to the Commission in an LB Report, or (d) are supplied to the Commission or its employees by a third party lawfully in possession thereof; or

(5) information or data which are supplied to the Commission in response to a compulsory process order other than an Order to File Special Report under the LB Program. By direction of the Commission.

Dated: May 13, 1975.

[SEAL]

CHARLES A. TOBIN,
Secretary.

**Line of Business Confidentiality Rules
40 Fed. Reg. 42243 (1975)**

FEDERAL TRADE COMMISSION

LINE-OF-BUSINESS REPORTING PROGRAM

*Resolution Requiring Annual Line of Business Reports
From Corporations and Confidentiality Rules and
Procedures for the 1974 Reporting Year*

Notice is hereby given that the Federal Trade Commission has approved, adopted and entered of record the following resolution requiring annual line of business reports from corporations:

Whereas, it is necessary for the proper functioning of the government that there be available to the President, the Congress, government agencies, and the business community, continuing and current financial data and statistics from corporations within the various industries and lines of commerce of the United States; and

Whereas, the Federal Trade Commission, acting pursuant to the authority vested in it by Section 6 of the Federal Trade Commission Act, is engaged in the collection of annual and special reports from corporations engaged in commerce and compilation and publication of the results thereof in combined statistical form for the purposes of said Act:

Now, therefore, it is hereby resolved that the Federal Trade Commission, in the exercise of the powers vested in it by Section 6 of the Federal Trade Commission Act (38 Stat. 721; 15 U.S.C.A., Section 46), and with the aid of any and

all powers conferred upon it by law and all compulsory processes available to it, does forthwith proceed to collect information, for the purposes herein stated, in the form of reports or otherwise, regarding the financial position and financial results of business operations, including, but not limited to the information called for by the attached Federal Trade Commission Form LB,¹ which is incorporated herein by reference together with such other facts as may be necessary for the classification and interpretation thereof, from such corporations as may be designated by the Commission pursuant to general or special order;

It is further resolved that the reports of and data relating to an individual company contained therein obtained as a result of this resolution shall be received in and afforded confidential status in accordance with and as spelled out in the Confidentiality Rules and Procedures for the 1974 Reporting Year adopted by the Commission, attached hereto and incorporated herein by reference (set forth below), and shall not be available for use in any Commission adjudication or in connection with any investigation for the purpose of initiating adjudicative proceedings.

CONFIDENTIALITY RULES AND PROCEDURES FOR
THE 1974 REPORTING YEAR

Notice is hereby given that the Federal Trade Commission has approved and adopted certain rules and procedures hereinafter set forth prescribing the confidential handling and use of reports to be filed by companies pursuant to an Order to File Special Report under the Line of Business

1. Copies of Glossary of Terms Used, Instructions, Industry Category List for FTC Form LB (1974), and Federal Trade Commission's Form LB filed as part of original document.

Program. The rules and procedures shall apply to reports relating to the 1974 reporting year. They do not apply to reports relating to the 1973 reporting year, the confidentiality of which are governed by the Rules and Procedures for the Use of Confidential Individual Company Data Collected Under the FTC's Line of Business Report Program issued in connection with the Commission's Resolution Requiring Annual Line of Business Reports from Corporations, dated August 2, 1974, and published in the FEDERAL REGISTER on August 27, 1974 (39 FR 30970).

Definitions: For purposes of these Rules and Procedures, the following definitions apply:

"LB Report" means a report filed by a company pursuant to an Order to File Special Report under the Line of Business (LB) Program.

"Reporting Company" means a company ordered to file an LB Report.

Confidentiality of LB Reports With Respect to Persons Outside the Commission: Pub. L. 93-563, which provides Federal Trade Commission appropriations for the fiscal year 1975, states in part that:

No part of these funds may be used to pay the salary of any employee, including Commissioners, of the Federal Trade Commission who—

• • •

(3) permits anyone other than sworn officers and employees of the Federal Trade Commission to examine the line-of-business reports from individual firms.

The Commission interprets this provision as prohibiting disclosure of LB Reports to any person outside the Commission including Congress, parties in court proceedings, governmental agencies and members of the public so long as the provision remains in effect. Accordingly, during the period this provision or a substantially similar provision in subsequent appropriations acts for the Federal Trade Commission remains in effect, LB Reports will not be disclosed to any person outside the Commission except pursuant to a superseding act of Congress; or pursuant to an order of a court but only after a motion by the Commission to quash and for a protective order have been disposed of by the court. In the event that the Commission receives a subpoena for an LB Report, it will promptly notify the Reporting Company.

Under Section 10 of the Federal Trade Commission Act, any officer or employee of the Commission who shall make public any information obtained by the Commission, without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor and upon conviction thereof, may be punished by a fine not exceeding five thousand dollars (\$5,000) or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

Confidentiality of LB Reports Within the Commission: Access to and use of LB Reports within the Commission shall be restricted as hereinafter set forth, and persons authorized to have access thereto and use thereof shall not release any LB Report, or in any way provide access thereto, to anyone not authorized to have access. LB Reports shall be used to compile statistical and other economic reports authorized by the Commission. The latter reports

may be utilized in connection with any Commission investigation or proceeding for carrying out specific law enforcement responsibilities of the Commission. However, they shall not be compiled in a way that LB data furnished by a particular Reporting Company can be identified. LB Reports shall not be made available to any person within the Commission for use in connection with any Commission investigation or proceeding for carrying out specific law enforcement responsibilities of the Commission. However, this restriction shall not limit the authority of the Commission to require by subpoena or other compulsory process the production of any information or data from any source outside the Commission for use in connection with an investigation or proceeding for carrying out specific law enforcement responsibilities of the Commission.

Except as hereinafter provided, access to and use of LB Reports within the Commission shall be restricted to the Division of Financial Statistics, Bureau of Economics; the Statistical Reports Unit of the Economic Research and Services Section, Bureau of Economics; and the Division of Management as hereinafter set forth.

The Division of Financial Statistics plans, develops and prepares for publication statistical and other economic reports such as the Quarterly Financial Report and the Annual Line of Business Report. The Division shall have access to and use of LB Reports for planning, developing and preparing such statistical and economic reports. Procedures sufficient to assure that LB data furnished by a particular Reporting Company can not be identified shall be developed and implemented by that Division in connection with each statistical or other economic report to be pub-

lished which is derived from LB data. With respect to each such report, the Assistant Director for Financial Statistics shall certify to the Director, Bureau of Economics, that he has reviewed and approved the procedures applied thereto.

The Statistical Reports Unit of the Economic Research and Services Section, Bureau of Economics, plans, develops and prepares for publication reports such as merger statistical reports, annual statistics on aggregate concentration and other statistical and economic reports authorized by the Commission. The Unit shall have access to and use of LB Reports for planning, developing or preparing such statistical and economic reports. Publication of any report which is derived from LB data shall be conditioned upon a determination by the Assistant Director for Financial Statistics that the procedures applied therein are sufficient to assure that LB data furnished by a particular Reporting Company cannot be identified, and certification of his determination to the Director, Bureau of Economics.

The Division of Management shall have access to LB Reports but only during and for the purpose of electronic processing of information and data contained in LB Reports. The Division may employ the services of an outside computer facility for purposes of computer processing of LB data subject to the restriction that no one other than authorized employees of the Federal Trade Commission may examine the LB Reports from individual Reporting Companies.

Employees of the Division of Financial Statistics and the Statistical Reports Unit of the Economic Research and

Services Section, while assigned to either of these units, shall not participate in any Commission investigation or proceeding for carrying out specific law enforcement responsibilities of the Commission. Any employee who transfers into or out of either of these units shall be formally notified in writing that he is subject to these Rules and Procedures and to Section 10 of the Federal Trade Commission Act.

The Director, Bureau of Economics, shall not have access to LB Reports. He shall, however, have supervisory responsibility and authority with respect to the Division of Financial Statistics and the Statistical Reports Unit of the Economic Research and Services Section. Such responsibility and authority shall include approving any reports prepared by them, making recommendations with respect to the preparation of such reports, and exercising any other supervisory control not requiring access to LB Reports.

Upon notification to the General Counsel by the Assistant Director for Financial Statistics that a Reporting Company has failed adequately to comply with an Order to File Special Report under the LB Program, the following additional Commission officers and employees shall have access to such parts of that company's LB Report required to evaluate the noncompliance and to advise and represent the Commission with respect to any proceeding initiated because of a refusal or failure of the Reporting Company to file an adequate LB Report: the General Counsel and his staff and the Commissioners and their assistants.

Security of LB Reports: All Commission members and employees authorized to have access to and use of LB Re-

ports as hereinbefore provided shall, while in possession of any such material, be personally responsible for ensuring that unauthorized personnel do not obtain access to such material and for observing the following procedures:

1. All LB Reports and reproductions of LB data from individual Reporting Companies (such as tabulations, punch cards, tapes or printouts, etc.) shall be conspicuously marked "Confidential".

2. All rooms containing LB Reports and reproductions of LB data from individual Reporting Companies shall be locked except when occupied.

3. All LB Reports and reproductions of LB data from individual Reporting Companies shall be stored in locked drawers, files or cabinets except when being used.

4. All LB Reports and reproductions of LB data from individual reporting Companies shall be returned to the Division of Financial Statistics immediately after any authorized use of such material is no longer required.

Limitations: The Rules and Procedures set forth above shall not apply to:

- (1) disclosure to a court of an LB Report of a Reporting Company in connection with a proceeding initiated because of a refusal or failure of that company to file an adequate LB Report;

- (2) the identity of a Reporting Company;

- (3) information or data furnished by a Reporting Company in a context other than an LB Report (e.g., a motion

to quash or other motion challenging an Order to File Special Report under the LB program); such information or data shall be treated as confidential pursuant to §§4.10-4.11 of the Commission's procedures and rules of practice only upon request with a showing of justification therefor, and a determination by the Commission, with due regard to statutory restrictions, the Commission's procedures and rules of practice and the public interest, that such information or data should not be made public;

(4) information or data which (a) are in the public domain, (b) enter the public domain from a source other than the Commission or its employees, (c) were in the Commission's possession prior to transmission to the Commission in an LB Report, or (d) are supplied to the Commission or its employees by a third party lawfully in possession thereof; or

(5) information or data which are supplied to the Commission in response to a compulsory process order other than an Order to File Special Report under the LB Program.

By direction of the Commission.

CHARLES A. TOBIN,
Secretary.

**Line of Business Confidentiality Rules
41 Fed. Reg. 28041 (1976)**

FEDERAL TRADE COMMISSION

LINE-OF-BUSINESS REPORTING PROGRAM

*Confidentiality Rules and Procedures for the
1975/1976 Reporting Years*

Notice is hereby given that the Federal Trade Commission has approved and adopted certain rules and procedures hereinafter set forth prescribing the confidential handling and use of reports to be filed by companies pursuant to an Order to File Special Report under the Line of Business Program. The rules and procedures shall apply to reports relating to the 1975/76 reporting years. They are the same rules that apply to reports relating to the 1974 reporting year.

DEFINITIONS

For purposes of these Rules and Procedures, the following definitions apply:

“LB Report” means a report filed by a company pursuant to an Order to File Special Report under the Line of Business (LB) Program.

“Reporting Company” means a company ordered to file an LB Report.

**CONFIDENTIALITY OF LB REPORTS WITH RESPECT TO
PERSONS OUTSIDE THE COMMISSION**

Pub. L. 94-121, which provides Federal Trade Commission appropriations for the fiscal year 1976, states in part that:

No part of these funds may be used to pay the salary of any employee, including Commissioners, of the Federal Trade Commission who—

* * *

(2) permits anyone other than sworn officers and employees of the Federal Trade Commission to examine the line-of-business reports from individual firms

* * *

The Commission interprets this provision as prohibiting disclosure of LB Reports to any person outside the Commission including Congress, parties in court proceedings, governmental agencies and members of the public so long as the provision remains in effect. Accordingly, during the period this provision or a substantially similar provision in subsequent appropriations acts for the Federal Trade Commission remains in effect, LB Reports will not be disclosed to any person outside the Commission except pursuant to a superseding act of Congress; or pursuant to an order of a court but only after motion by the Commission to quash and for a protective order have been disposed of by the court. In the event that the Commission receives a subpoena for an LB Report, it will promptly notify the Reporting Company.

Under Section 10 of the Federal Trade Commission Act, any officer or employee of the Commission who shall make public any information obtained by the Commission, without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor and upon conviction thereof, may be punished by a fine not exceeding five thousand dollars (\$5,000) or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

CONFIDENTIALITY OF LB REPORTS WITHIN THE COMMISSION

Access to and use of LB Reports within the Commission shall be restricted as hereinafter set forth, and persons authorized to have access thereto and use thereof shall not release any LB Report, or in any way provide access thereto, to anyone not authorized to have access. LB Reports shall be used to compile statistical and other economic reports authorized by the Commission. The latter reports may be utilized in connection with any Commission investigation or proceeding for carrying out specific law enforcement responsibilities of the Commission. However, they shall not be compiled in such a way that LB data furnished by a particular Reporting Company can be identified. LB Reports shall not be made available to any person within the Commission for use in connection with any Commission investigation or proceeding for carrying out specific law enforcement responsibilities of the Commission. However, this restriction shall not limit the authority of the Commission to require by subpoena or other compulsory process the production of any information or data from any source outside the Commission for use in connection with an investigation or proceeding for carrying out specific law enforcement responsibilities of the Commission.

Except as hereinafter provided, access to and use of LB Reports within the Commission shall be restricted to the Division of Financial Statistics, Bureau of Economics; the Statistical Reports Unit of the Economic Research and Services Section, Bureau of Economics; and the Division of Management as hereinafter set forth.

The Division of Financial Statistics plans, develops and prepares for publication statistical and other economic re-

ports such as the Quarterly Financial Report and the Annual Line of Business Report. The Division shall have access to and use of LB Reports for planning, developing and preparing such statistical and economic reports. Procedures sufficient to assure that LB data furnished by a particular Reporting Company can not be identified shall be developed and implemented by that Division in connection with each statistical or other economic report to be published which is derived from LB data.

With respect to each such report, the Assistant Director for Financial Statistics shall certify to the Director, Bureau of Economics, that he has reviewed and approved the procedures applied thereto.

The Statistical Reports Unit of the Economic Research and Services Section, Bureau of Economics, plans, develops and prepares for publication reports such as merger statistical reports, annual statistics on aggregate concentration and other statistical and economic reports authorized by the Commission. The Unit shall have access to and use of LB Reports for planning, developing or preparing such statistical and economic reports. Publication of any report which is derived from LB data shall be conditioned upon a determination by the Assistant Director for Financial Statistics that the procedures applied therein are sufficient to assure that LB data furnished by a particular Reporting Company cannot be identified, and certification of his determination to the Director, Bureau of Economics.

The Division of Management shall have access to LB Reports but only during and for the purpose of electronic processing of information and data contained in LB Re-

ports. The Division may employ the services of an outside computer facility for purposes of computer processing of LB data subject to the restriction that no one other than authorized employees of the Federal Trade Commission may examine the LB Reports from individual Reporting Companies.

Employees of the Division of Financial Statistics and the Statistical Reports Unit of the Economic Research and Services Section, while assigned to either of these units, shall not participate in any Commission investigation or proceeding for carrying out specific law enforcement responsibilities of the Commission. Any employee who transfers into or out of either of these units shall be formally notified in writing that he is subject to these Rules and Procedures and to section 10 of the Federal Trade Commission Act.

The Director, Bureau of Economics, shall not have access to LB Reports. He shall, however, have supervisory responsibility and authority with respect to the Division of Financial Statistics and the Statistical Reports Unit of the Economic Research and Services Section. Such responsibility and authority shall include approving any reports prepared by them, making recommendations with respect to the preparation of such reports, and exercising any other supervisory control not requiring access to LB Reports.

Upon notification to the General Counsel by the Assistant Director for Financial Statistics that a Reporting Company has failed adequately to comply with an Order to File Special Report under the LB Program, the following additional Commission officers and employees shall have

access to such parts of that company's LB Report required to evaluate the non-compliance and to advise and represent the Commission with respect to any proceeding initiated because of a refusal or failure of the Reporting Company to file an adequate LB Report: the General Counsel and his staff and the Commissioners and their assistants.

SECURITY OF LB REPORTS

All Commission members and employees authorized to have access to and use of LB Reports as hereinbefore provided shall, while in possession of any such material, be personally responsible for ensuring that unauthorized personnel do not obtain access to such material and for observing the following procedures:

1. All LB Reports and reproductions of LB data from individual Reporting Companies (such as tabulations, punch cards, tapes or printouts, etc.) shall be conspicuously marked "Confidential."
2. All rooms containing LB Reports and reproductions of LB data from individual Reporting Companies shall be locked except when occupied.
3. All LB Reports and reproductions of LB data from individual Reporting Companies shall be stored in locked drawers, files or cabinets except when being used.
4. All LB Reports and reproductions of LB data from individual Reporting Companies shall be returned to the Division of Financial Statistics immediately after any authorized use of such material is no longer required.

LIMITATIONS

The Rules and Procedures set forth above shall not apply to:

(1) Disclosure to a court of an LB Report of a Reporting Company in connection with a proceeding initiated because of a refusal or failure of that company to file an adequate LB Report;

(2) The identity of a Reporting Company;

(3) Information or data furnished by a Reporting Company in a context other than an LB report (e.g., a motion to quash or other motion challenging an Order to File Special Report under the LB program); such information or data shall be treated as confidential pursuant to §§4.10-4.11 of the Commission's procedures and rules of practice only upon request with a showing of justification therefor, and a determination by the Commission, with due regard to statutory restrictions, the Commission's procedures and rules of practice and the public interest, that such information or data should not be made public;

(4) Information or data which (a) are in the public domain, (b) enter the public domain from a source other than the Commission or its employees, (c) were in the Commission's possession prior to transmission to the Commission in an LB Report, or (d) are supplied to the Commission or its employees by a third party lawfully in possession thereof; or

(5) Information or data which are supplied to the Commission in response to a compulsory process order other than an Order to File Special Report under the LB Program. By direction of the Commission.

Dated: June 10, 1976.

JAMES A. TOBIN,
Acting Secretary.



OCT 26 1978

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-169

MILLIKEN & COMPANY,

*Petitioner,**v.*FEDERAL TRADE COMMISSION, *et al.*,*Respondents.*

**REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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New York, New York



IN THE
Supreme Court of the United States
October Term, 1978

No. 78-169

MILLIKEN & COMPANY,

Petitioner,

v.

FEDERAL TRADE COMMISSION, *et al.*,

Respondents.

**REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

In its petition, Milliken & Company showed that the Court of Appeals ignored the applicable precedents of this Court and a well reasoned decision of the Fifth Circuit when it concluded that Milliken's challenges to the FTC's LB and CPR programs were premature.

The FTC asserts (FTC Br. at 21) that judicial review is premature because it has not yet made a final decision to

publish either LB or CPR data, and that there are substantial uses it can make of those data without publication. These assertions are belied both by the record and by logic.

The record demonstrates that the FTC and its staff have publicly said eight times that they are collecting LB data because they intend to publish them.¹ They have made similar statements about the CPR program on at least three occasions.² The FTC's protestations that it has not finally decided to publish are thus a matter of litigation convenience, and are not substantiated by the FTC's own official, public acts.

Furthermore, any use the FTC might make of Milliken's LB data, *even use within the Commission*, must comply with the LB confidentiality rules contained in statute and regulation.³ Those rules govern the use of LB data by *any* person (except certain statistical and data processors on the FTC staff). Thus, if the FTC intends to utilize LB

1. Resolution Requiring Annual Line of Business Reports from Corporations (Court of Appeals LB Appendix ("LBA") at 466); 1973 Form LB (LBA 2452); Supporting Statement of FTC Staff for 1973 Form LB (LBA 367); Denial of Motions to Quash 1973 Form LB (LBA 486-494); Denial of Renewed Motions to Quash 1973 Form LB (LBA 555 et seq., esp. 557-58); Bureau of Economics Staff Statement about Proposed 1974 Form LB (LBA 2229, 2307-08); Statement to Comptroller General in Support of 1974 Form LB (LBA 720); Denial of Motions to Quash 1974 Form LB (LBA 877-96).

2. Statement to Comptroller General in Support of CPR Form (Court of Appeals CPR Appendix ("CPRA") 256, esp. 257, 263); Staff letter to GAO (CPRA 281, 285-86); Statement of the Commission Concerning Confidentiality (CPRA 303).

3. Appropriations Acts, 88 Stat. 1822, 1841 (1974); 89 Stat. 611, 634-35 (1975); 90 Stat. 937, 956 (1976); Confidentiality Rules, 39 Fed. Reg. 30970 (1974); 40 Fed. Reg. 21542 (1975); 40 Fed. Reg. 42243 (1975); 41 Fed. Reg. 28041 (1976).

data for any purpose, such as investigation or economic study, even if that use is "internal" to the FTC and its staff, the FTC will be required to comply with the confidentiality rules, *i.e.*, to "publish" the data (Milliken Petition at 12 & n.6; 19 & n.11).

Similarly, unless the FTC intends to publish individual company CPR data, it cannot justify collecting them, because it can get any other data it needs from the Census Bureau (Milliken Petition at 10-11; 19 & n.11).

Thus, the FTC's own statements, as well as the inherent nature of each program, establishes that the FTC is collecting these data because it intends to publish them. No case stands for the proposition that when publication is the *raison d'être* of a program, judicial review of publication is premature when raised as a challenge to collection.⁴ Indeed, the principles of *Service v. Dulles*, 354 U.S. 363 (1957), and *Vitarelli v. Senton*, 359 U.S. 535 (1959)—that the validity of any agency's act must be determined in light of its own stated purpose—compel the opposite result.

4. The Commission cites two cases which it contends support this proposition. Neither does. In *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976), the Court of Appeals had decided that the record failed to support the FPC's decision. This Court held that the Court of Appeals had erred in specifying the time, manner and place at which the FPC was to take additional evidence to supplement the record. Thus, that case dealt with the court's interference with the FPC's procedures and processes.

In the case at bar Milliken has demonstrated as a matter of substantive law that because the only possible reason for collection is publication, the only way to determine if the FTC has acted properly in deciding to collect Milliken's data is to consider if the FTC can publish them.

The FTC also cites *Electric Bond & Share Co. v. SEC*, 303 U.S. 419, 438 (1938). As we explained in our petition (Milliken Petition at 19), this case is inapposite because it deals with an investigative subpoena which obtained data that lawfully could be used internally by the SEC without subsequent publication.

Finally, the FTC asserts that Milliken still has an adequate administrative remedy by which it can challenge publication. The FTC therefore contends that the Court of Appeals' decision in this case does not conflict with the Fifth Circuit's decision in *Genuine Parts Co. v. FTC*, 445 F.2d 1382 (5th Cir. 1971). Whatever the "adequacy" (or futility) of Milliken's remaining administrative remedies, if any, the fact remains they were not published in the Federal Register. Thus, the District of Columbia Circuit's decision emasculates the Federal Register Act, 5 U.S.C. §552(a)(1) and conflicts with *Genuine Parts*.⁵

In short, the FTC has failed to demonstrate any reason why this Court should not grant a writ of certiorari.⁶

5. The FTC also contends Milliken has never requested notice of the FTC's intention to publish its data. The reason, of course, is that under the FTC's own view the proper time to raise this question is when Milliken files its LB and CPR forms. This has not yet been done. Further, because Milliken has four times requested exclusion from these programs on the grounds that its data cannot be published, this claim is disingenuous. Contrast Supreme Court Rule 23(1)(c) (question presented in a petition for certiorari includes every subsidiary question fairly comprised therein).

6. As we explained in our petition, only the first two questions it presents are unique to Milliken (Milliken Pet. at 2 n.1, 3-4 n.3, 23 n.16). As to all of the other questions raised in Milliken's petition we believe the FTC has not adequately answered the reasons this Court should grant a writ of certiorari, which reasons were set forth in Milliken's petition for certiorari and in the petitions in 78-167 and 78-168, in greater detail. We understand that reply briefs will be filed in Nos. 78-167 and 78-168, and on these common issues Milliken's reply to the FTC is the same as that of the other corporate parties.

Conclusion

The importance of the questions presented is shown by the petition, the briefs, and even the FTC's opposition. This Court should grant the petition and issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

October 26, 1978
New York, New York

Respectfully submitted,

PAUL J. NEWLON
GERALD A. MCCARVILLE
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